IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 3849 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

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KADVAJI @ BHARATJI FULAJI

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 3849 of 2001

MS KD PARMAR for Petitioner No. 1

MR HL JANI ASSTT GOVERNMENT PLEADER for Respondent No. 1-3

CORAM : MR.JUSTICE H.K.RATHOD

Date of decision: 07/08/2001

ORAL JUDGEMENT

#. Heard Ms.K.D.Parmar, learned advocate appearing on behalf of the petitioner and Mr.H.L.Jani, learned AGP on behalf of the respondents. In the present petition, the order of detention dated 6th January, 2001 which actually effected on 10th January, 2001 has been

challenged by the petitioner under Article 226 of the Constitution of India. The order of detention has been passed by the District Magistrate, Mehsana under Section 3[1] of the PASA Act. The present petitioner has been detained in District Jail Bhavnagar as Class-II detenu. The grounds of detention have been communicated and supplied to the petitioner under Section 9[1] of the PASA Act. According to the grounds of detention, three offences have been registered against the present petitioner under the provisions of the Bombay Prohibition Act and the last offence registered is dated 6th November, 2000. The statements of the secret witnesses were recorded on 26th November, 2000 and the same has been verified by the detaining authority on 4th January, 2001. The detaining authority has claimed privilege under Section 9[2] of the PASA Act and accordingly not disclosed the names, addresses and occupation of the secret witnesses. That three unregistered offence have been noted dated 5th October, 2000, 21st October, 2000 and 23rd November, 2000 on the basis of the statements of the secret witnesses. However, it is noted that no reply has been filed by the respondents.

#. The co-detenu of the present petitioner namely Thakor Girishji alias Gidhaji Jenaji against whom also detention order has been passed on 6th January, 2001 which also came to be actually effected on 10th January, 2001. However, this Co-accused - Thakor Girishji alias Gidhaji Jenaji has also challenged the detention order before this Court by preferring Special Civil Application No.3742 / 2001, wherein also, in all three offences have been registered against the co-detenu as registered against the present petitioner. Similarly, statements of the secret witnesses were also recorded on 26th November, 2000 and verified by the detaining authority on 4th January, 2001. Unregistered offence also noted against the co-detenu as noted against the present petitioner and the detaining authority has also claimed privilege under Section 9[2] of the PASA Act and no reply has also been filed by the respondents in the case of the co-detenu.

#. Learned advocate Ms.K.D.Parmar has challenged the detention order on various grounds but according to her submission, two contentions are enough for vitiating the detention order. A specific contention has been raised as to claiming of privilege under Section 9[2] of the Act without examining the genuineness of the statements made by the secret witnesses in para-12 of the petition and similarly in para-11, contention of delay has also been raised by the petitioner. That looking to the last offence registered against the present petitioner on date

6th November, 2000 and the order of detention has been passed on 6th January, 2001. Therefore, there was delay in passing the detention order. However, such delay has remained unexplained because no reply has been filed by the respondents. She relied upon the decisions of this Court in respect of claiming of privilege by the detaining authority and submitted that some extra care which ought to have been taken, has not been taken by the detaining authority. She also submitted that subjective satisfaction is not established from the record and she relied upon following decisions of this Court.

[1] 1994 [1] GLR 761 - para-7
[2] 2000 [3] GLR p.2696
[3] 1993 [2] GLR 1659 - para-6
[4] 1997 [1] GLH 381 - para-21

#. Learned AGP Mr.H.L.Jani appearing on behalf of the respondents has submitted that looking to the facts and circumstances and material which are on record, the detaining authority has rightly passed the detention order. He also submitted that looking to seriousness of the offence alleged to have been committed by the petitioner, there were compelling circumstances with the detaining authority and the detaining authority having no other option except to pass the detention order, otherwise, the activity which has been carried out by the petitioner would have certainly adversely affected maintenance of public order and therefore, according to him, the order of detention is legal and valid and in such situation, no interference is required by this Court.

#. I have considered the submissions of both learned advocates for the parties. The respondents have not filed any reply though specific contentions have been raised in the petition in para-11 and 12 of the petition in respect of claiming privilege under Section 9[2] of the PASA Act which adversely affected the right of the petitioner from making effective representation because not to disclose the names, addresses and occupation of the secret witnesses without examining the genuineness of the factual aspect narrated by the secret witnesses, such privilege cannot be available to the detaining authority before claiming privilege. It is the duty of the detaining authority to consider the general back ground, character and antecedents, criminal tendency or propensity of the detenu and reluctance of the witnesses who gave statement against the detenu. This aspect has not been taken into account by the detaining authority before claiming privilege under Section 9[2] of the PASA

Act. The detaining authority has only relied upon the fear expressed by the secret witnesses and not disclosed the names, addresses and occupation of the secret witnesses which is not enough for claiming privilege under Section 9[2] of the PASA Act. The view taken by the Full Bench of this Court in a reported decision in case of CHANDRAKANT PATEL V. STATE 1994 [1] GLR 671 is squarely covered this contention.

#. Referring to the second contention that there was delay in passing the detention order, it is submitted that looking to the last date of registered offence dated 6th November, 2000 and order of detention is dated 6th January, 2001, there was delay of about 2 months which remained unexplained because no reply has been filed by the respondent though specific contention has been raised by the petitioner in para-14 of the petition. Therefore, the view taken by this Court in reported decision 1997 [1] GLH 381 is squarely covers this contention. Therefore, it is necessary to consider the relevant observations of the following decisions, which are reproduced as under :-

In case reported in 1993 [2] GLR 1659, the relevant observations in para-6.

"6. His second contention is that the detaining authority has wrongly exercised the powers under Section 9[2] of PASA Act and by such wrong exercise of powers the detenu, right to make a representation under Article 22[5] of the Constitution has been infringed. He further elaborates his submission by pointing out that the statements of the witnesses have been recorded on 16th October, 1992 and that the said statements have been verified by the Superintendent of Police, C-Division, Baroda city on 16th October, 1992. It has been pointed out by the learned AGP Mr.Y.M.Thakkar that the proposal in the case was made on 16th October, 1992 and the order of detention was passed on 17th October, 1992. It is rather curious that the entire bunch of material was supplied by the sponsoring authority at the time of making the proposal and that has been promptly accepted by the detaining authority and passed the order on the next day itself. At the time of exercising the privilege under Section 9[2] of PASA, a balance is required to be struck between the public interest on the hand and the right of the detenu to make a representation under Article

22[5] of the Constitution on the other. If the statements of the witnesses are to be relied on, they must be genuine statements of the real persons. The detenu would like to verify as to whether these persons are fictitious persons or not and / or whether their statements are bogus statements or not ? Unless the detenu knows the names and addresses of the persons who have given the statements, he cannot verify the aforesaid facts and if the names and addresses along with the contents of the statements are supplied to the detenu, he can have full opportunity to verify the position and make an effective representation on that basis. As against this, there is a provision under Section 9[2] carved out on the basis on Article 22[5] of the Constitution which provides that nothing in sub-sec [1] shall require the authority making such order to disclose facts which it considers to be against the public interest to disclose. Therefore, it is the duty of the detaining authority to strike a balance as stated above, that in the public interest, the names and addresses of the witnesses could not be disclosed. This should not be treated as an idle formality as it affects the public interest on the one hand and the right of the detenu on the other. When that is so, the detaining authority is expected to do some exercise before actually exercising the privilege under Section 9[2] of PASA. Looking to the facts and circumstances of the case, it is clear, as stated hereinbefore, that the verified statements were also placed before the detaining authority and there was no sufficient time for the detaining authority to examine the possibility of exercising the power under Section 9[2], as the proposal was made on 16th October, 1992 and the order of detention was passed on the following day, i.e. 17th October, 1992, nor is there any material to show as to how he examined the the necessity of exercising the power under Section 9[2]. Under the circumstances, in our view, it is a wrong exercise of power under Section 9[2] which has affected the detenu's right of making an effective representation under Article 22[5] of the Constitution of India and therefore, the continued detention of the detenu is bad and illegal and the impugned detention order is required to be quashed and set aside."

In case of CHANDRAKANT N. PATEL VS. STATE OF GUJARAT reported in 1994 [1] GLR 761, para-7.

"7. If we examine the decisions in the case of Bai Amina and in the case of Balakrishna closely, it becomes clear that what has been briefly stated as the correct legal position as regard the nature and extent of the privilege in the case of Balkrishna, has been more elaborately stated in the case of Bai Amina. The inconsistency appearing in the said two decisions is more superficial than real. In the case of Balkrishna, the right of the detenu has been described as a matter of private interest whereas in the case of Bai Amina , this Court has regarded that interest as "another public interest" and this according to the learned Additional Public Prosecutor, is the basic inconsistency in the said two decisions. In Balakrishna's case, the interest of the detenu has been described as a private interest while considering reasonableness of the restriction on the fundamental right of the citizen. The context in which the said right has been described as a matter of private interest becomes clear from the following observations made by the Court in that case :

"..... But as a privilege can only be claimed in public interest, the Constitution has placed interest above the private interest, even though the private interest may mean the liberty of the citizen."

Thus, the said observation came to be made by the Court in Balakrishna's case keeping the detenu in mind while the observation which has been made by this Court in Bai Amina's case is with reference to the nature and extent of the constitutional right of the detenu when he is detained by way of preventive action. In a case where a person is detained by way of preventive action. In a case where a person is detained by way of preventive action, it is the liberty of an individual detenu which is involved and in that sense, it can be said that it is a matter of private interest and not public interest. But the right of the person so detained is recognised as a fundamental right by the Constitution and taking away of such right can only be in public interest. Adversely affecting liberty and such a right, therefor, can

properly be regarded as a matter of public interest. We are, therefore, of the opinion that there is no inconsistency between the ratio of the division bench decision in the case of Balkrishna and the ratio of the decision of the division bench in the case of Bai Amina. We are also of the opinion that even otherwise also, it cannot be said that Bai Amina's case does not lay down good law. As stated above, the observations which have been made as to when and how the privilege can be claimed are made with a view to show what can be regarded as proper application of mind to all the relevant aspects; what can be regarded as proper application of mind to all the relevant aspects; what can be regarded as sufficient for purpose of claiming privilege; and when exercise of the privilege can be regarded as bona fide, whether that privilege has been exercised bona fide and properly or not obviously will have to be decided in each case by reference to the facts of that case. In the case of Balkrishna and also in the case of Bai Amina it has been so held. Considering the law relating to preventive detention, the nature of the right conferred on the detenue and the circumstances under which that right can be adversely affected, we do not think that what has been held in Bai Amina's case is not good law. Whether the detaining authority can be said to have applied its mind to all the relevant aspects properly or not would be a question of fact in each case and will have to be decided with reference to the facts of that case. Since the satisfaction in this behalf has to be of the detaining authority, obviously, the promise of confidentiality given by the person recording the statement cannot by itself be regarded as sufficient ground for withholding the disclosure of such particulars and materials. But if, after considering the general background, character, antecedent, criminal tendency or propensity, etc., of the detenue and the reluctance of the witnesses who gave the statements against the detenue, the detaining authority is satisfied about the necessity of withholding some particulars or materials, then it cannot be said that the same was not done in public interest, and that public interest likely to be subserved by non-disclosure did not outweigh or override the public interest intended to be served by disclosure of the relevant particulars and materials to the

detenue.

In case of Ranubhai B. Bharwad v. State, reported in 2000 [3] GLR pg.2696.

"After referring to Kalidas C. Kahar V. State of Gujarat, 1993 (2) GLR 1659 the Court observed :

The statements of the three witnesses in the instant case which were recorded before the Police Inspector on 17th August, 1999, 21st August, 1999 and 25th August, 1999 with regard to the incidents dated 10th July, 1999, 13th June, 1999 and 26th June, 1999 were the material along with the proposal which is said to have made on 27th August, 1999 and it is clear from the record that it was on 29th August, 1999 that the detaining authority has recorded its verification of all these three statements. There is nothing on record to show that the detaining authority had considered the proposal dated 27th August, 1999 at any time prior to 29th August 1999 and on 29th August, 1999, all that has been done is that the concerned witnesses have stated before the detaining authority that the statements as had been made on the respective dates were correct and immediately thereafter on the following day, i.e. on 30th August, 1999 the detention order has been passed. [para 9]

The manner in which the verification has been recorded of the statements made by these three witnesseth for the purpose of Section 9(2) shows that the same has been done only as an empty formality inasmuch as the same witnesses had been called before the statements made by the witnesses were correct. Thus, the whole exercise appears to have been done as a mechanical exercise and it is not borne out that there is an active application of mind on this aspect of the matter by the detaining authority for the purpose of verification of the facts as had been disclosed by the witnesseth so as to express the fear and to invoke the privilege under Section 9(2) against the disclosure of the names and addresses of the witnesses and it thus appears on the basis of the ratio of the decision of the Division bench that it is a case of wrong exercise of power under Section 9(2) and it is established that in such cases, the wrong

exercise of power under Section 9(2) adversely affects the detenu's right of making an effective representation guaranteed under Article 22[5] of the Constitution of India. [para 9].

Once the materials are placed before the detaining authority with the proposal by the sponsoring authority, it must have reasonable sufficient time for the purpose of verification of the fats and the consideration of the entire material with an active application of mind and the order has to be passed at the earliest opportunity, but in this process to strike the balance between the public interest and the right of the detenu either of the two should not be defeated in any manner and the whole process must indicate that the detaining authority had applied its mind with the requisite approach and it had also devoted sufficient time before arriving at the decision to claim the privilege under Section 9(2) of the Act and also to come to the conclusion that the detenu was required to be detained immediately. In the facts of the present case, I find that this requirement of maintaining the balance has been defeated and the detention order has been passed on 30th August, 1999, i.e. on the next day to the date on which the materials were considered by the detaining authority. [para 9]

In light of the contention of delay, view taken by this Court in reported decision in 1997 [1] GLH p.381 wherein the relevant observations are in para-21 are quoted as under :-

"21. In the instant case, the last registered case is of May 20, 1996. The petitioner detenu was granted anticipatory bail by the competent Court. He was also granted regular bail subsequently. The impugned order of detention has been passed on November 05, 1996, i.e. after a delay of 5 months and 15 days. It is of course true that the detaining authority has relied on two incidents of 2nd October and 10th October 1996, both unregistered cases. I have gone through the allegations. I fail to understand if the allegations are really of such a grievous nature, why the cases have not been registered against the petitioner. There appears to be some substance in the contention of the petitioner

that these two unregistered cases have been referred only with a view to cover up the gap or to give life to a stale case. This unexplained delay makes a ground of detention not proximate, vitiating the order of detention itself. If I am to buttress my findings, I would say the reference may be made to the decision of the Supreme Court in Anand Prakash v. State of U.P. reported in AIR 1990 SC 516 and Pradeep Nilkanth v. S.Ramamurthy reported in 1993 [2] Suppli. SCC 61."

#. In view of above observations of this Court as well as Apex Court in respect of above contentions, according to my opinion, looking to the facts of the present case, there is delay of more than two months in passing the detention order from the last date of registered offence and such delay admittedly remains unexplained in absence of reply and there was no immediate danger or requirement or there was no justification for immediate proximity or nexus to pass detention order. It is pertinent to note that no affidavit in reply has been filed by the respondents therefore, the order of detention is required to be quashed and set aside. Similarly, as regards the claim of privilege under section 9[2] of the PASA Act without considering general background, character, antecedent, criminal tendency or propensity etc., of the detenu and the reluctance of the witnesses who gave the statements against the detenu, the detaining has not taken into account all these aspect before claiming the privilege under Section 9[2] of the Act and therefore also, non consideration of the relevant criteria before claiming the privilege under Section 9[2] of the PASA Act, the order of detention is required to be quashed and set aside.

#. In the result, the present petition is allowed. The order of detention dated 6th January, 2001 which actually came to be effected on the detenu on 10th January, 2001 passed by the District Magistrate, Mehsana is hereby quashed and set aside. The petitioner - detenu - Shri Kadvaji @ Bharatji Fulaji who has been detained at Sabarmati Central Jail is ordered to be set at liberty forthwith if he is not required in any other case. Rule is made absolute with no order as to costs.

Date : 7-8-2001 [H.K.Rathod, J.]

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